Friday, July 9.

FIRST DIVISION.

[Bill Chamber, Lord Lee.

BERTRAM *v.* GUILD (POTTER'S TRUSTEE).

Bankruptcy — Preferable Claim — Lease — Compensation.

In virtue of a clause in his lease a landlord from time to time resumed parts of the land let, paying compensation to the tenant at an annual rate fixed by the lease. The compensation money thus annually due to the tenant came to exceed the amount of his rent. The landlord's estates having been sequestrated, the tenant claimed a preferable ranking in the sequestration for the excess of compensation money from date of sequestration to the close of the lease. The trustee allowed him an ordinary ranking only. *Held* (*rev.* Lord Lee, Ordinary) that the claim being personal and unsecured, was not entitled to a preferable ranking, and trustee's deliverance *affirmed* accordingly.

By lease dated in December 1863 Lewis Potter, merchant in Glasgow, let to William Bertram certain lands of the farm of Greenfield for nineteen years from Martinmas 1863 at an annual rent of £190. By lease dated in January 1874 Mr Potter let to the same tenant certain lands of the farm of Burnbank for nine years from Martinmas 1873 at the yearly rent of £100. Both leases contained clauses (in slightly different terms) by which power was reserved to the landlord to resume possession of any part of the lands so let, *inter alia*, for sale or feuing, or for any other purpose for which the landlord might desire or require the same, compensation, however, being always to be allowed to the tenant for any land so resumed and for any damage he might sustain in consequence of such resumption, the amount of such compensation, as fixed in the manner and at the rate per acre specified in the leases, to be paid annually from the time of resumption during the remainder of the lease. In virtue of this power Mr Potter from time to time resumed considerable portions of land on both farms for the purposes of feuing, and on an adjustment of claims as at Martinmas 1877 it was round that the amount of compensation money payable annually by the landlord to the tenant exceeded the amount of the rent payable by the tenant, to the extent, in the case of Greenfield, of £99, 16s., and in the case of Burnbank, of £54, 1s. 3d. Thereafter additional portions of the farm of Greenfield were resumed by the landlord, and the compensation due by him in respect thereof was by agreement between the parties, dated February 5, 1878, fixed at £78, 9s. annually during the currency of the lease. The land resumed by the landlord was feued out by him for feu-duties amounting in all to about £1000.

Mr Potter's estates were sequestrated on 1st November 1878, and Mr James Wyllie Guild, C.A., was appointed trustee thereon. Mr Bertram lodged a claim to be ranked as a preferable creditor in the sequestration for the sum of £1196, 8s. 9d., this total being composed of (1) £891, 5s., being compensation money at the rate of £178, 5s. per annum from Martinmas 1878 to the termination of the lease as at Martinmas 1882, in respect of land resumed on Greenfield farm; (2) £270, 6s. 3d., being compensation at the annual rate of £54, 1s. 3d. during the same period in respect of land resumed on Burnbank; and (3) sums in respect of compensation for unexhausted manure, amounting to £34, 17s. 6d.

The trustee rejected the claim for a preferable ranking, but admitted it to an ordinary ranking for the sum of £1078, 13s., and rejected it *in toto* for the remaining sum of £117, 15s. 9d., in respect that no deduction had been made from the sums claimed for interest thereon from date of sequestration until due. The tenant appealed against this deliverance.

He averred—"The respondent, as trustee foresaid, is vested in and in right and possession of the whole property of the said Lewis Potter, including the said lands of Greenfield and Burnbank, and he has also, as trustee foresaid, adopted the contracts of lease between the appellant and the said Lewis Potter, and the feu-contracts or charters into which the said Lewis Potter entered with reference to the lands so resumed by him as aforesaid, and has exacted the feu-duties payable thereunder."

He pleaded—"(1) The respondent, as trustee foresaid, being vested in and in right and possession of the whole property of the said Lewis Potter, including the said subjects, and having adopted the contracts of lease and feu mentioned or referred to in the condescendence, the appellant is entitled to the preferable ranking claimed by him."

The trustee pleaded—"(1) The appellant being, in respect of the contracts referred to, an ordinary creditor of the said Lewis Potter, is not entitled to a preferable ranking. (2) In any view, the appellant is not entitled to be ranked for interest which has accrued since the date of sequestration."

The Lord Ordinary on the Bills (LEE) pronounced this interlocutor and note:—

"*5th June* 1880.—The Lord Ordinary having considered the debate and whole process, together with the copy leases now produced, Recals the deliverance of the trustee appealed from in so far as the same rejects the appellant's claim to a preferable ranking: Finds that the bankrupt's obligation under the leases referred to in the affidavit and claim, that the appellant should be allowed or paid annually during the remainder of the lease compensation in respect of land of which the tenant might be deprived of possession by resumption on the part of the landlord in manner therein provided, is a condition of said leases and of the trustee's possession of that part of the bankrupt's estate possession of which was resumed in terms thereof: Therefore remits to the trustee to rank the appellant preferably in terms of his claim, but under deduction of the sum of £117, 15s. 9d. of interest on sums claimed from the date of sequestration until due, as to which sum affirms the trustee's deliverance and dismisses the appeal, and decerns: Finds the appellant entitled to expenses.

"*Note.*—The only point upon which the trustee's deliverance was questioned is that relating to the preferable ranking claimed by the appellant, and with reference to this the facts are not in dispute. The amount of the appellant's claim (apart

from the deduction made by the trustee on account of interest) is admitted, and it was not maintained that, if entitled to a preference at all, any part of it was in a worse position than the rest. . . . . .

"The estates of the proprietor were sequestrated on 1st November 1878, and the respondent as trustee in the sequestration has entered into possession of these estates and is vested in them, of course under the burden of existing leases. He has admittedly adopted the feu-contracts granted by the bankrupt, which appear to have been taken up on terms favourable to the estate in any view of the appellant's claims; and has uplifted the feu-duties payable for the lands resumed and feued under the reserved powers in the leases.

"The question which now arises is, Whether the tenant is entitled in the bankruptcy of the landlord to rank preferably for the compensation payable to him under his lease? It is not disputed by the trustee that the appellant is entitled to set off the compensation in extinction of the rent payable by him. But it is contended that *quoad* the excess the appellant's claim is entitled to no preference, but is that of an ordinary creditor.

"On the other hand, it is maintained on the part of the appellant that the landlord's obligation to pay compensation 'annually during the remainder of the lease' is an inherent condition of the resumption of possession, and must be fulfilled by the landlord or anyone who in his right takes the estate. It is urged that the trustee on the landlord's sequestrated estate takes it (and especially the ground feued) subject to the conditions of the lease, of which the annual payment of this compensation is one, and that he is not entitled to keep the appellant out of possession for any year of the leases' endurance without fulfilling that condition.

"The Lord Ordinary has found the question to be attended with difficulty. His first impression (formed before seeing the leases) was that the exercise of the reserved power of resumption might be viewed as having the effect of taking the land resumed out of the lease, just as if it had never been included in it, and of leaving the tenant's claim of compensation in the position of an ordinary debt. But on examination of the leases he has come to be of opinion that the contract in each case must be regarded as a whole, and as a real right, continuing in its entirety during the whole period, subject only to the qualification that if the reserved power shall be exercised, the condition of payment for the land resumed shall be accepted by the tenant in place of the land of the possession of which he is deprived. The leases bind the tenant to accept the stipulated annual payment, but this is annually enforceable; and if the landlord had resumed the land for his own personal occupation the Lord Ordinary is of opinion that his trustee could not have let the land to another tenant or sold it without fulfilling the condition of annually paying the value to the present agricultural tenant. It was argued in support of the trustee's deliverance that no preference had been stipulated, and nothing had been done to constitute a preference. But if the Lord Ordinary's view be correct, no special stipulation was requisite, and nothing needed to be done. The appellant's claim arises out of the fact that the trustee takes the property of the bankrupt under the burden of the lease and of all the conditions of the lease—at least all lawful conditions. Of the legal result of taking up the property of a bankrupt, held by him under contract involving obligations which form a condition of his right, the Lord Ordinary does not imagine there is any doubt—*Cuthill* v. *Jeffrey*, Nov. 21, 1818, F.C.; *Kirkland* v. *Gibson*, May 17, 1831, 9 Sh. 596, aff. 6 W. and S. 340, also 16 Sh. 860; *Stewart* v. *M'Ra*, Nov. 12, 1834, 13 Sh. 4, and *Stewart* v. *Campbell*, *ib.* 7; *Marquis of Abercorn* v. *Grieve*, Dec. 16, 1835, 14 Sh. 168; *Dundas* v. *Morison*, Dec. 4, 1857, 20 D. 225. The only question is, whether this particular claim forms an essential condition of the lease attaching to the subject as taken up by the trustee? Upon this point the only authority cited was the case of *Arbuthnott* v. *Colquhoun*, M. 10,424. But the present case seems to be still clearer. The Lord Ordinary is of opinion that in this case it is impossible, with a due regard to the meaning of the contract, to separate the obligation arising from the landlord's exercise of the power of resumption from the tenant's real rights under the lease. He considers that the trustee, as in a question with the tenant, must be held to possess the ground resumed and feued by virtue of the reserved power, and under the condition attached to the exercise of that power. It seems to him to be a fair test to suppose that the ground had been resumed by the landlord for his own occupation, and in that state of matters he cannot doubt that the trustee could not have been permitted to continue the occupation year by year during the remainder of the lease, to the effect of keeping the appellant out of possession of a part of the subjects let, without fulfilling the condition of payment annually of the ground so taken.

"On these grounds the Lord Ordinary is unable in this case to sustain the deliverance of the trustee."

The trustee reclaimed, and argued — The appellant had no real right in the lands. He had merely a personal claim. The trustee had not adopted the contracts of lease; he did not represent the bankrupt in his liabilities. Even adoption by the trustee would not give right to a preferable ranking, but only to a personal action against the trustee. The trustee in cases of lease had never been found liable beyond the amount of rents drawn by him, and here there were no rents to draw.

Argued for the respondent—The tenant's right under a lease was a real right, available even against singular successors. A trustee in a sequestration was less favoured, since he took the estate only *tantum et tale* as it stood in the bankrupt. The trustee admitted on record that he had adopted the contracts of lease; he was therefore bound to fulfil all the obligations in the leases, just as he could enforce the prestations in favour of the landlord. While the property of the lands in question was vested in the trustee in respect of the feudal title and the sequestration, the right to possess the resumed lands during the remainder of the leases could only be claimed by the trustee in respect of the leases. The trustee had adopted the contracts of feu by which the resumed lands had been feued out, and drew the large feu-duties derived therefrom. He was thus *lucratus* by a sort of civil possession of said lands.

The feu-duties were truly a *surrogatum* for the lands, and the claimant had thus a *quasi* real right therein.

Authorities—*Maclean's Trustee* v. *M'Lean of Coll's Trustee*, Nov. 21, 1850, 13 D. 90; *Lindsay* v. *Webster*, Dec. 9, 1841, 4 D. 231; *Thomson* v. *Terney*, May 13, 1791, Hume 780; *Myles* v. *City of Glasgow Bank*, Feb. 28, 1879, 6 R. 718; *Harvie* v. *Haldane*, July 2, 1833, 11 S. 872.

At advising—

Lord President—The circumstances of this case are certainly very peculiar. The tenant of the lands of Greenfield and Burnbank instead of paying anything as rent for the farms, has been in receipt of an annuity from the landlord, and it is for several years of that annuity that this claim is now made in the landlord's sequestration. It appears that as regards the lands of Greenfield they were let to the claimant by the bankrupt in 1863 at a rent of £190 on a nineteen years' lease, and that the farm of Burnbank was let in 1874 on a nine years' lease at a rent of £100. The two leases would thus expire at the same term, viz., Martinmas 1882. The land at the time it was let was apparently valuable for agricultural purposes only, but it was obviously anticipated by the proprietor that during the currency of the lease it would become profitable for other purposes, and therefore he reserved to himself full power of resumption of any part of the lands. This power is somewhat differently expressed in each case, but that is of no importance to us at present. In exercise of the power of resumption thus reserved, considerable portions of the lands were resumed by the landlord at various times, and feued out to various parties under feu-charters granted by the bankrupt; and in February 1878 an adjustment was made of the amount of compensation payable by the landlord to the tenant for the land he had so resumed. The result was that for each year subsequent to Martinmas 1877 the landlord undertook to pay the tenant a sum exceeding the rent in the case of each farm, the amount of excess payable in respect of Greenfield being £178, 5s. per annum, and that in respect of Burnbank being £54, 1s. 3d. Now, the claim of the tenant in the landlord's sequestration is for the excess of compensation over rent from November 1878 to the termination of the lease; that is for some years a prospective claim—a consideration to which the trustee has duly given effect.

The total claim is for £1196. The trustee has ranked the claimant for this amount, subject to certain abatements for interest in respect of its being in part a future debt, and the claimant has appealed and claimed a preferable ranking. The Lord Ordinary has given effect to that claim. The only question before us is therefore, Whether the claimant should be ranked as a preferable or as an ordinary creditor? I confess I have great difficulty in understanding the grounds on which the Lord Ordinary has decided in favour of a preferable ranking. I agree with an observation made by Mr Kinnear in the course of the argument, to the effect that to entitle a creditor to be ranked preferably he must have either a privileged debt or a security. Now this claimant has neither. It is not said that this is a privileged debt, and it would be difficult to say what sort of security he can be said to hold. No doubt, so far as regards the amount of rent payable under the leases, he can set that off against an equivalent amount of this compensation claim; and he may be said to have a security in so far as by his right of retention, or by a balancing of accounts in bankruptcy, the debt due by him for rent is extinguished by an equal amount of compensation claim. But then the claim now before us is for the excess of the compensation money over the rent. The argument presented to us on behalf of the claimant took this form—that the lease constituted a real right to the land, and that though part of it was resumed by the landlord the compensation therefor was a preferable charge on the land so resumed. I do not see how that can be maintained when the effect of resumption was to put the proprietor in the same position in dealing with that land as if it had never been embraced in the lease at all, and that that was the effect I have no doubt. What the tenant gets is an obligation from the landlord to pay him an annual sum of money; that is a personal obligation, and is not made real. As regards the land which is resumed, the tenant's right is at an end in the same way as if he had renounced or surrendered his right. If a man sells land and stipulates a price, but does not receive payment when he grants the conveyance, he is only a creditor for the price, and the land passes to the disponee; he has no security unless it be specially created by deed. So, if a man holds land in lease and surrenders his right to the lease, and stipulates for an annuity in return, the land so surrendered becomes the absolute and unburdened property of the landlord, and the tenant becomes the other's creditor for the price; nor does it matter whether it be a slump sum or, as here, an annuity. I have therefore come to the conclusion that this tenant has no ground of preference whatever. He is certainly a fortunate tenant, and has made a good bargain, but I see no ground for giving him a preference over the other creditors of the bankrupt.

Lord Deas and Lord Mure concurred.

Lord Shand—I am of the same opinion. When sequestration occurred on 1st November 1878 the position of parties was this, that the landlord was by arrangement under an obligation to pay an annuity to the tenant. The ordinary position of parties was simply reversed; the tenant in place of having to pay any rent, had the landlord bound to pay to him a yearly sum in excess of his rent. The tenant had no security for this payment except to a limited extent, viz., the amount of his rent, which he could retain; but he was only a personal creditor for the remainder of the sum. Thus, in claiming against this estate, the basis of his claim is a personal obligation only, and so he must rank like the other creditors, though he is fortunate in so far as he has rent in his own hands, which will enable him to obtain a preference as regards part of the sum due to him.

The appellant's argument was substantially rested on the view that the trustee had adopted the lease. If it had been so, in the sense in which a trustee is said to adopt a lease with certain advantages in favour of the bankrupt, I doubt whether there would have been a proper claim for a preferable ranking. I rather think the trustee, having taken benefit of the contract, would be personally liable to implement the counter-obliga-

tion therein, and there would have been a direct claim against the trustee rather than a claim to a preferable ranking among the creditors. But there has been no proper case of adoption presented to us upon the facts. The only facts founded on were that the trustee had right to the rents, and, secondly, that he was retaining possession of ground which had been resumed. Now, as to the rent, he was getting no benefit, for the tenant retained his rent in satisfaction *pro tanto* of his counter-claim. Nor, in the second case, was he taking benefit as a contracting beneficiary under the lease. In retaining the land of which the bankrupt landlord had resumed possession he took benefit simply from a contract which was begun, concluded, and acted upon before he became trustee on the estate. If the case be supposed that Mr Potter after resuming the land had sold it, or had sold the feu-duties for a capital sum, it could hardly have been then suggested that the trustee for the creditors was taking a benefit under the lease. Yet the argument, if sound, must go this length, that the tenant would in that case have been entitled to rank as a preferable creditor for the sum he is now asking. Or to suppose another case, that the arrangement had been that the tenant should have right to a capital sum in place of an annuity, could it have been maintained that he had right in that case to a preferable ranking? I see no ground for that view. It was a mere accident that the creditors happened to get the benefit of the feu-duties, and cannot affect the legal rights of parties. This is not a case where the principle of adoption takes effect. There has not been adoption in the sense that the trustee has taken benefit of a lucrative lease, and so rendered himself personally liable in fulfilment of certain stipulations. He has simply taken up the lands as he found them in the person of the bankrupt as proprietor.

I am therefore of opinion that this is not a case in which anything but an ordinary ranking can be allowed.

The Court recalled the Lord Ordinary's interlocutor, refused the appeal, and affirmed the deliverance of the trustee.

Counsel for Appellant (Respondent)—Asher—Dickson. Agents—Bruce & Kerr, W.S.

Counsel for Respondent (Reclaimer)—Kinnear—Lang. Agents—Campbell & Smith, S.S.C.

Tuesday, July 13.

FIRST DIVISION.

[Sheriff of Aberdeenshire.

JAMIESON *v.* M'LEOD AND ANOTHER (JAMIESON'S EXECUTORS).

Donation Mortis Causa—*Deposit-Receipt—Presumption.*

Facts and circumstances in which *held* that donation *mortis causa* of a deposit-receipt and its contents by a husband to his wife had not been instructed.

Observations on *Crosbie's Trustees* v. *Wright and Others*, May 28, 1880, 17 Scot. Law. Rep. 597.

William Jamieson, crofter, died on 15th January 1878, and Francis Jamieson was decerned his executor-dative *qua* one of the next-of-kin on 17th May following. The wife of the deceased, Mrs Barbara Moir or Jamieson, uplifted shortly after his death a deposit-receipt with the North of Scotland Bank at Turriff, which was in the following terms:—

"£50. "*North of Scotland Bank,*
"*Turriff, 25th May* 1877.

"Received from Mr William Jamieson and his wife, Mrs Barb. Jamieson, Milltack, King Edward (payable to either or the survivor), fifty pounds sterling, which is placed to their credit on deposit-receipt with the North of Scotland Banking Company."

Mrs Jamieson died about two months after her husband, leaving a last will and testament by which Alexander M'Leod and George Barron were appointed her executors.

The present action was raised by William Jamieson's executor against the executors of Mrs Jamieson to determine who had right to the contents of the deposit-receipt, and for the settlement of other claims between the parties in regard to Mr Jamieson's executry estate.

The pursuer pleaded—"(1) The said deposit-receipt belonging exclusively to the deceased William Jamieson, and the same being unwarrantably uplifted by his widow after his death, the same belongs to the estate of the said William Jamieson, and the defenders, as executors foresaid, are bound to repay the amount of it to the pursuer as his executor."

The defenders pleaded—"(1) The said deposit-receipt having belonged exclusively to the defenders' author, they ought to be assoilzied from the conclusions of the action so far as regards the sums contained therein."

A proof was led, from which it appeared that the receipt in question was the last of a series of receipts in the same or similar terms, dating from 1867 onwards, and that shortly before the date of the first of these a considerable sum of money for arrears of wages had been paid to Jamieson and his wife by their employer, the proceeds of which were probably contained in that receipt. The sum deposited had decreased from £308 to £50, and it had been operated upon mainly, if not solely, by the husband.

The Sheriff-Substitute (Dove Wilson) pronounced this interlocutor:—"Finds in fact that the sum of fifty pounds sued for by the pursuer was deposited in bank by his author in name of himself and of his wife, or the survivor of them; that said sum was money which belonged to the pursuer's author; that during his lifetime he retained the control of it; and that it is not proved that he made a donation of it to his wife: Finds in law that the terms of the deposit-receipt did not constitute a bequest to the wife." . . . . He added this note:—

"*Note.*—This case seems to be ruled by the case of *Watt's Trustees*, 1st July 1869, 7 Macph. 930. The only difference is that here the parties in whose favour the deposit-receipt was granted were husband and wife, while there the parties were aunt and niece. The difference is immaterial. In this case, as in *Watt's*, there had been a series of similar deposit-receipts, and the deceased had all along dealt with them as being his